REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

HONGKONG BANK CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5410

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated: APR 29 1999

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DECISION

This is a petition for review filed by the petitioner, HONGKONG BANK CORPORATION, against respondent COMMISSIONER OF INTERNAL REVENUE, for the latter's failure to act on the former's claim for refund/tax credit of the amount of ₱3,574,711.00, allegedly representing its overpaid gross receipts taxes for the years 1994 and 1995.

As represented, petitioner is a banking institution duly organized and existing under the laws of the Republic of the Philippines, with principal office located at 6780 Ayala Avenue, City of Makati.

For the four quarters of 1994 and 1995, petitioner filed with respondent its Quarterly Percentage Tax Return and paid the corresponding gross receipts tax (GRT) for each of the said quarters, hereunder summarized, the tax bases of which include the passive income which was subjected to twenty percent (20%) final taxes, already withheld and paid to respondent by the various clients of petitioner.

Period Covered	GRT	Date Paid	Exh.
1994			
1st Qtr. (Jan. to March)	P15,518,515.29	4-20-94	(Annex A, Pet. for Review)
2nd Qtr. (April to June)	14,338,856.61	7-20-94	B
3rd Qtr. (July to Sept.)	14,500,282.11	10-20-94	C
4th Qtr. (Oct. to Dec.)	14,417,521.10	1-20-95	D
1995			
1st Qtr. (Jan. to March)	P22,563,086.71	4-20-95	E
2nd Qtr. (April to June)	18,065,697.69	7-20-95	F
3rd Qtr. (July to Sept.)	21,283,354.75	10-20-95	G
4th Qtr. (Oct. to Dec.)	12,397,193.03	1-22-96	H

After taking into account the decision of this Court in the case of **Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, January 30, 1996,** which ruled that the 20% final withholding tax on interest income should not form part of the taxable gross receipts, petitioner filed with the respondent on July 19, 1996, an application for a tax refund/tax credit of its alleged overpaid GRT for the four quarters of 1994 and four quarters of 1995 in the aggregate amount of P3,574,711.00 (Exh. II).

On the same date, or on July 19, 1996, petitioner filed with this Court the instant petition for review.

Petitioner presents the proposition as reason of the petition for review that the gross receipts tax it paid for the aforesaid period were based on the total gross receipts, inclusive of the passive income which were subjected to the 20% final withholding tax at source, thus, it stressed that in the light of this Court's decision in the Asian Bank case, *supra*, which states that the 20% final withholding tax on interest income should not form part of the taxable gross receipts, petitioner has actually overpaid the amount due from it insofar as its GRT obligations are concerned, thus, a tax refund/tax credit is therefore, in order.

Respondent, on the other hand, in his special and affirmative defenses, contends that petitioner's claim for tax refund/credit is still undergoing administrative routinary investigation/examination by respondent's Bureau; the alleged refundable gross receipts taxes were collected and paid pursuant to law and pertinent BIR implementing rules and regulations, hence, the same are not refundable; petitioner's allegations that it erroneously and excessively paid its gross receipts tax during the years under review does not *ipso facto* warrant the refund/credit; petitioner must likewise prove that the alleged refundable/creditable gross receipts taxes were neither automatically applied as tax credit against its tax liability for the succeeding quarter/s of the succeeding year nor included as creditable taxes declared and applied to the succeeding taxable year(s); claims for tax refund/credit are construed in *strictissimi juris* against the taxpayer as it partakes the nature of an exemption from tax and it is incumbent upon the petitioner to prove that it is entitled thereto under the law; and petitioner must prove that it has complied with the provision of Section 230 of the Tax Code, as amended.

It must be emphasized that unlike Value Added Tax (VAT) and Income Tax, the Gross Receipts Tax (GRT) has no excess tax that can be credited to the succeeding taxable year/s. It is always an exact tax, hence, the argument of respondent that petitioner must prove that refundable gross receipts tax were neither automatically applied as tax credit against its tax liability for the succeeding taxable quarter/s of the succeeding year nor included as creditable taxes declared and applied to the succeeding taxable year/s, is devoid of merit.

The decisive issue that comes to fore for Our consideration is: whether or not the 20% final withholding tax on certain passive income of the Petitioner should be excluded in its total gross receipts, for GRT purposes, resulting in the overpayment of gross receipts tax.

With regard to the legal issue, We rule in the affirmative. This is not the first time that this Court has been confronted with such issue at hand. As correctly stated by the petitioner, this Court has resolved the same issue in the case of **Asian Bank**

Corporation vs. Commissioner of Internal Revenue, *supra*, which is anchored on similar factual circumstances and on all fours with the case at bar. Hence, we find no cogent justification to depart from the wisdom of our decision in said case, which states in part, to wit:

> "The assessment for GRT is based on Section 119 of the Tax Code, quoted hereunder thus:
>
> > **SEC. 119.** ***Tax on banks and non-bank financial intermediaries. - There*** shall be collected a tax on gross receipts derived from sources within the Philippines by all banks and non-bank financial intermediaries in accordance with the following schedule:
> >
> > (a) On interest, commissions and discounts from lending activities as well as income from financial leasing, on the basis of remaining maturities of instruments from which such receipts are derived.
> >
> > Short-term maturity not in excess of two (2) years 5%
> >
> > Medium-term maturity-over two years but not exceeding four (4) years 3%
> >
> > Long-term maturity:
> > (i) Over four (4) years but not exceeding seven (7) years 1%
> >
> > (ii) Over seven (7) years 0%
> >
> > (b) On dividends 0%
> >
> > (c) On royalties, rentals of property, real or personal, profits

> from exchange and all other items treated as gross income under Section 28 of this Code 5%
>
> *Provided, however,* That in case the maturity period referred to in paragraph (a) is shortened thru pretermination, then the maturity period shall be reckoned to end as of the date of pretermination for purposes of classifying the transaction as short, medium or long term and the correct rate of tax shall be applied accordingly.
>
> Nothing in this Code shall preclude the Commissioner from imposing the same tax herein provided on persons performing similar banking activities.

The aforequoted provision of the law speaks of gross receipts as the basis of the 5% bank tax or GRT, and it is petitioner's contention that the interest income included as part of such gross receipts should be computed minus the final tax already withheld by various withholding agents for the reason that such amount did not actually go to its funds, hence was not actually received by them.

We agree with the petitioner that the 20% final withholding tax on its interest income should not form part of its taxable gross receipts.

Revenue Regulations No. 12-80 dated November 7, 1980 on Taxation of Certain income Derived from Banking Activities provides that the rates of tax to be imposed on the gross receipts of such financial institution; shall be based on all items of <u>income actually received</u>, thus:

SEC. 4. xxx xxx xxx

(e) *Gross receipts tax on banks, non-bank financial intermediaries, financing companies, and other non-bank financial intermediaries not performing quasi-banking activities.* - *The* rates of taxes to be imposed on the gross receipts of such financial institutions <u>shall be based on all items of income actually</u>

received. Mere accrual shall not be considered, but once payment is received on such accrual or in cases of prepayment, then the amount actually received shall be included in the tax base of such financial institutions, as provided hereunder. (Underscoring supplied)

From the foregoing, it is but logical to infer that the final tax, not having been received by the petitioner but instead went to the coffers of the government, should no longer form part of its gross receipts for the purpose of computing the GRT. This conclusion is in accord with the interpretation of the Supreme Court in the case entitled **Collector of Internal Revenue vs. Manila Jockey Club,** 108 Phil. 821, as quoted by this Court in disposing of a similar issue in the case entitled **Compania Maritima vs. Acting Commissioner of Internal Revenue,** CTA Case No. 1426 dated November 14, 1966, thus:

In the second place, the highest tribunal of the land interpreted the term "gross receipts: to mean all receipts of a taxpayer excluding those which have been especially earmarked by law or regulation for the government or some person other than the taxpayer. Thus, it was held:

> "xx xx. The government could not have meant to tax as gross receipt of the Manila Jockey Club the 1/2 % which it directs same club to turn over to the Board of Races. The latter being a Government institution, there would be double taxation, which should be avoided unless the statute admits of no other interpretation. In the same manner, the Government could not have intended to consider as gross receipt the portion of the funds which it directed the Club to give, to winning horses and Jockeys-admitted 5%. It is true that the law says that out of the total wager funds 12 1/2 % shall be set aside as the 'Commission' of the track owners but the law itself takes official notice, and virtually approves or directs payment of the portion that goes to owners of horses as prizes and bonuses of jockeys,

> which portion is admittedly 5% out of the 12 1/2 % commission. As it did not at that time contemplate the application of 'gross receipts' revenue principle, the law in making a distribution of the total wager funds, took no trouble of separating one item from the other; and for convenience, grouped three items under one common denomination.
>
> "Needless to say, gross receipts of the proprietor of the amusement place should not include any money which although delivered to the amusement place has been especially earmarked by law or regulation for some person other than the proprietor." (The Commissioner of Internal Revenue vs. Manila Jockey Club, Inc., G.R. Nos. L-13890 & L-13887, June 30, 1960)

It is to be noted that, under Section 260 of the Tax Code, a race-track is subject to an amusement tax of 20% of its gross receipts and the term 'gross receipts' embraces all the receipts of the proprietor, lessee, or operator of the amusement place." Notwithstanding the broad and all-embracing definition of the term "gross receipts" found in our amusement tax law, our Supreme Court did not adopt a literal interpretation of the said term in the case of the Manila Jockey Club, Inc., ***supra.***"

The legal issue having been settled, what remains to be resolved by this Court now involves factual matters and that is whether or not petitioner has established by evidence its claim for refund.

After a minutiose scrutiny of the petitioner's evidence, the Court finds that the evidence adduced by the petitioner did not clearly establish the accuracy of the amount claimed as refund.

Petitioner's claim for refund pertaining to the first quarter of 1994 had already been barred by prescription. Records show that Petitioner's Quarterly Percentage Tax Return for the first quarter was filed on April 20, 1994 (par. 3, petition for review) while the instant petition was filed only on July 16, 1996. More than two (2) years had elapsed from the date of payment of the tax, thus, petitioner's claim corresponding to the first quarter of 1994 is already barred by prescription, hence can no longer be considered in the final analysis. The preceding fact of prescription was even admitted by petitioner in its memorandum (page 11), but it nevertheless prayed that the amount of ₱3,574,711.00 earlier claimed, inclusive of the claimed refund for the first quarter of 1994, be granted. Based on the Summaries of Tax Paid Income submitted, the claim for refund excluding the amount corresponding to the first quarter of 1994 should be limited to the amount of ₱3,552,393.75 computed as follows:

Quarter Involved	Exh.	Amount
1994		
Second	J	₱ 226,338.47
Third	N	606,309.24
Fourth	R	353,792.03
1995		
First	U	310,953.00
Second	X	326,787.38
Third	AA	1,093,734.05
Fourth	DD	634,479.58
		₱3,552,393.74

It must be emphasized that the income earned by petitioner on its passive investments consist of interest income from local banks, interest income on loans subject to FWT (more commonly known as interbank call loans), interest on treasury bills, interest on unlisted/long term investments and interest income on loans to banks, all of which were allegedly subjected to twenty percent (20%) final withholding tax (FWT) and finally to gross receipts tax (GRT). It is important to enumerate the kinds of investments made by petitioner because the evidence needed to prove overpayment of gross receipts tax will depend largely on the nature/kind of said passive investments.

To prove that it earned interest from local banks for the years 1994 and 1995 that were subjected to 20% FWT and GRT, petitioner submitted as evidence the Summaries of the Tax Paid Income (Exhs. J-1, N-1, R-1, U-1, X-1, AA-1 and DD-1), the summaries of the GRT paid (Exhs. M, O, S-2, V-2, Y-2, BB-2 and EE-3) and the Profit and Loss Accounts Summaries (Exhs. L-1, P-1, W-2, Z-2 and CC-3). A perusal of these exhibits disclose that these documents merely enumerate, in general, the various interest income received by petitioner from local banks, without any indication as to how much final taxes were withheld therefrom and remitted by its withholding agents to the respondent's Bureau, for the account of petitioner. To be entitled to the claim for refund, petitioner should have submitted or offered in evidence the Statements or Certificates of Tax Withheld at Source issued by its withholding agents, together with the summary of the said withholdings. Same is true with the interest income of petitioner on loans (interbank call loans) which were subjected to final withholding tax (FWT). No evidence was presented to support the allegation that the same were subjected to final withholding taxes by its withholding agents, thus, We cannot fully appreciate the figures found in the Summaries of Tax Paid Income and Profits and Loss Accounts (Exhs. J-2, N-2, R-2, U-2, X-2 and AA-2) as these were not properly supported by source documents such as Certificates of Final Income Tax Withheld

With respect to the interest income earned from government securities/treasury bills in 1994 that were subjected to twenty percent (20%) FWT and to GRT, petitioner presented in evidence its prepared summaries of Tax Paid Income (Exhs. J-3, N-3 and R-3), pages from the general ledgers (Exhs. K-1 to K-4, Q-1 to Q-3, and T-1 to T-9), and the working papers on the Profit and Loss Accounts and the GRT Paid (Exhs. L-2, O-2 and S-3). Further, petitioner presented the Confirmation Receipts evidencing its purchase of T-bills (Exhs. GG-1 to GG-65). These exhibits, merely show that the amounts stated in the summaries of Tax Paid Income tally with the balances reflected in the general ledgers. To be able to get the total interest income of petitioner based on its summary of the 1994 Confirmation of Purchase Receipts (Exhibit "GG"), this Court divided the total amount of the withholding taxes corresponding to these purchases by 20% which resulted in the amount of P227,183,269.15. It was observed however that the total interest income on treasury bills as evidenced by Exhibit "GG" is more than the amount of interest income indicated in the summaries of Tax Paid Income corresponding to treasury bills (see Exhibits "J-3", "N-3" and "R-3") which has the sum total of only P127,107,181.18, detailed as follows:

PER SUMMARY OF TAX PAID INCOME	**P127,107,181.18**
PER CONFIRMATION OF PURCHASE RECEIPTS	**227,183,269.15**
DISCREPANCY	**P100,076,087.97**

To be truly reflective of the amount of interest income earned from treasury bills, there should not have been any discrepancy between the total sum reflected in the summaries mentioned (Exhibits "GG"" and Exhibits "J-3", "N-3" and "R-3") and any discrepancy may be attributed to the possibility that the T-bills purchased by petitioner (Exhibit "GG") were subsequently sold to third persons, hence some of the interest income reflected in said Exhibit "GG" may not have been earned by petitioner. The documents submitted by petitioner are not sufficient to enable us to determine the accuracy of the figures indicated in the Summary of Confirmation of Purchase Receipts for 1994. Petitioner should have submitted Certificates of Confirmation of Sales (with petitioner as seller) so that the amount reflected therein will be deducted from the total amount of interest income derived from the summary denominated as Exhibit "GG" so that we can accurately determine the amount of interest income earned by petitioner from treasury bills/government securities for the year 1994. Unfortunately, petitioner failed to enlighten this Court in this important aspect.

As to the interest income earned by petitioner on treasury bills/government securities during the period January to December, 1995 which were allegedly subjected to FWT and gross receipts tax, it likewise presented the Summaries of Tax Paid Income (Exhs. U-3, X-3, AA-3 and DD-3), the working papers (Exhs. V-1, Y-1, BB-1 and EE-1) and the Profit and Loss Account Summaries (Exhs. W-2, Y-1, CC-1 and FF-1). Again these exhibits are incomplete to grant the desired relief. Petitioner failed to adduce in evidence its general ledger for this account (Interest Income on Treasury Bills). This book is essential in the instant claim, as this would show that indeed petitioner earned interest income from government securities/

treasury bills for the year 1995. Needless to state that once more petitioner failed to reconcile its interest income in government securities for 1995 per its Summary of Tax Paid Income and per its Confirmation of Purchase Receipts (Exhs. HH to HH-121.)

Lastly, the Court finds that petitioner's claimed refund on its interest income on unlisted/long term investment and loans to banks, which were allegedly subjected to final withholding tax and to gross receipts tax, must also be denied as petitioner failed to present any evidence to this effect.

In summary, the Court finds that petitioner failed to prove its claim for refund factually by clear and convincing evidence.

Accordingly, applying to the case at bar the settled rule in this jurisdiction that the burden of proof is on the claimant to present evidence on the facts in issue necessary to establish his claimed refund (**Citibank N.A. vs. Court of Appeals, G.R. 107434, October 10, 1997**) and that the claim for refund is in the nature of a claim for exemption, hence, should be construed in *strictissimi juris* against the taxpayer (**Commissioner of Internal Revenue vs. Tokyo Shipping Co., Ltd., 244 SCRA 332**), the Court finds and so holds that petitioner is not entitled to the refund being claimed for the taxable years 1994 and 1995.

IN THE LIGHT OF ALL THE FOREGOING, finding the instant petition for review without merit, the same is hereby **DISMISSED** and petitioner's claim for refund is hereby **DENIED.** No costs.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

(Dissenting)
AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge

REPUBLIC OF THE PHILIPPINES
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DISSENTING OPINION

The majority opinion decided to deny the instant petition due to insufficiency of evidence.

In my humble opinion, I believe that the claim for refund should be denied for lack of legal basis and not on the grounds of insufficiency of evidence.

The ruling in the Asian Bank case which declared that the 20% final withholding tax on the bank's interest and other passive income should not form part of the taxpayer's gross receipts, is, to my mind erroneous as there is no provision in the Tax Code or any special law which excludes the 20% final withholding tax from the total gross receipts for purposes of computing the 5% gross receipts tax.

Section 8(c) of Revenue Regulations No. 12-80, dated November 7, 1980, as amended by Section 7(c) of Revenue Regulations No. 17-84, dated October 12, 1984 have the same provisions, thus:

> "If the recipient of the above-mentioned items of income are financial institutions, the same shall be included as part of the tax base upon which the gross receipts tax is imposed."

Clearly, there is no doubt that the 20% final withholding tax is legally includible as part of the gross receipts for purposes of computing the gross receipts tax.

The petitioner cited the case of **Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720, dated January 30, 1996**, where this Court has upheld the petitioner's contention that the interest income included as part of such gross receipts should be computed minus the 20% final tax already withheld and deducted by various withholding agents for the reason that the amount did not go to its funds, hence, was not actually received by them. And the Court approved the petitioner's citation of Section 4(e) of Revenue Regulations No. 12-80, dated November 7, 1980, thus:

> "Gross receipts tax on banks, non-bank financial intermediaries, financing companies, and other non-bank financial intermediaries not performing quasi-banking activities. - The rates of taxes to be imposed on the gross receipts of such financial institutions shall be based on all items of income actually received. Mere accrual shall not be considered, but once payment is received on such accrual or in cases of overpayment then the amount actually received shall be included in the tax base of such financial institutions, as provided hereunder."

This Court concluded in said case that from the aforestated provisions it can logically be inferred that the amount representing the final tax, not having been received by the petitioner but instead went to the coffers of the government, should no longer form part of its gross receipts for purposes of computing the gross receipts tax. Such conclusion in law is legally objectionable for two (2) reasons, to wit:

(1) Section 4(e) of Revenue Regulations No. 12-80 is not a computation determinative of the amount of gross receipts as basis of the gross receipts tax under Section 119 of the Tax Code. Said revenue regulations merely authorize the determination of the amount of gross receipts on the basis of the method of accounting being used by the taxpayer under Section 37 of the Tax Code. Such accounting methods for tax purposes comprise a set of rules for determining when and how to report income and deductions (Consolidated Mines, Inc. vs. CTA, L-18843, August 29, 1974). The two principal accounting methods expressly and impliedly recognized by the Tax Code and the Income Tax Regulations are:

(a) Cash receipts and disbursement method or cash basis. - Income earned by the taxpayer is not included in gross income until received and expenses are not deducted until paid within the taxable year; and

(b) Accrual basis. - Income is included in gross income when earned, whether received or not, and expenses are allowed as deductions when incurred although not yet paid within the year.

(2) That the non-inclusion of the 20% final withholding income tax from the gross interest income for purposes of the gross receipts tax operates as an exemption from tax. Being an exemption from tax, the same must be construed strictly not against the government but against the one who asserts the claim of exemption. Tax exemption can only be given effect when the grant is clear and categorical inasmuch as taxation is the rule and exemption is the exception, Section 26, Tax Code. The holding therefore in the Asian Bank Corporation to the effect that the non-inclusion of the 20% final withholding income tax from the gross receipts can logically be inferred from the wordings of said Section 4(e) of Revenue Regulations No. 12-80, is misplaced.

Tax statutes are to receive a reasonable construction with a view to carrying out their purpose and intent (51 Am Jur 361). It should not be construed as to permit the taxpayer to easily evade the payment of the tax (Cabon Steel Co. vs. Lewelyn, 251 U.S. 501). Thus, the good faith of the taxpayer is not sufficient justification for exemption from the payment of surcharges imposed by law (Commissioner vs. Royal Interocean Lines and CTA, L-26506, July 30, 1970). A tax statute should be construed to avoid the possibilities of tax evasion (Lorenzo vs. Posadas, 64 Phils. 353).

The High Court's decision in the case of **Commissioner of Internal Revenue vs. The Manila Jockey Club, Inc., 108 Phils. 821, June 30, 1960**, which was reaffirmed by the said Court in the case of **Visayan-Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 357, February 27, 1965** cannot be considered as precedent cases, hence, inapplicable to the two cases decided by this Honorable Court in the cases of **Compania Maritima vs. Acting Commissioner of Internal Revenue, CTA Case No. 1426 dated November 14, 1966 and Asian Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 4720 dated January 30, 1996**, for the following reasons:

> In the Manila Jockey Club, Inc. case, the Club was authorized to operate horse races in which betting was made through the sale of tickets to the public. The total amount of bets called "wager fund" were distributed pursuant to Executive Order No. 320 and Republic Act No. 309, as follows:
>
> 87% as dividends to holders of winning tickets
>
> $12^1/_2$ as "commissions" of the Manila Jockey Club, of which $^1/_2$ % was assigned to the Board on Races and 5% was distributed as prizes for owners of winning horses and authorized bonus for jockeys.

According to the above-mentioned distribution of the "wager fund", the then Collector of Internal Revenue assessed the Club on the whole amount of its "commission" of $12^1/_2$. But since the Club had already paid the amusement tax based on its 7% share of the "commission", the amount assessable pertains only to the $5^1/_2$% for the period from November 1946 to October 1950. On various instances, the Club protested the proposed assessments and was sustained by the opinions of the Secretary of Justice rendered on three different occasions (Opinion No. 345, series of 1941; Opinion No. 249, series of 1952 and Opinion No. 340, series of 1955).

Notwithstanding the opinions of the Secretary of Justice to the effect that the amount corresponding to the $5^1/_2$% was held only by the Club in trust for the owners of winning horses and authorized bonuses of jockeys, the then Collector of Internal Revenue demanded payment of amusement taxes for the period November 1946 to October 1950. Said demand letter was timely appealed to the Court of Appeals wherein a unanimous judgment was obtained reversing the Collector's stand on the matter. In the High Court, the position of the Secretary of Justice was sustained thereby upholding the Court of Tax Appeals' decision.

Accordingly, gross receipts of the proprietor of the amusement place should not include any money which, although delivered to the amusement place <u>was "especially earmarked</u>" by law or legal rule and regulations for some persons other than the proprietor. Undeniably, they are money received by the racing club but they are moneys earmarked by law or regulations for winning horse owners and jockeys and never for a minute become the property of the race track. The same is true in the case of the $^1/_2$% which the law directs the club to deliver to the Board on Races. The High Court therefore agrees with the stand of the Court of Tax Appeals that such funds representing $5^1/_2$% of the $12^1/_2$% "commissions" of the race track do not form part of the gross receipts, hence not subject to the amusement tax of 20%.

The above-mentioned decision of the High Court was also applied in the case of **Visayan Cebu Terminal Co., Inc. vs. Commissioner of Internal Revenue, 13 SCRA 357, Nos. L-19530 and L-19444, February 27, 1965**. The legal issue involved in this case is the interpretation of the management contract entered into by and between the Bureau of Customs and Visayan Cebu Terminal Co., Inc. whereby the latter as contractor was appointed the sole manager of the Arrastre Service at the Port of Cebu City. In the said Management Contract, it was further agreed and understood that in consideration of the rights and privileges granted the Contractor for the management of the Arrastre Service, the Bureau of Customs shall receive twenty eight (28%) percent of the total monthly gross income derived from whatever source in connection with the operations of the Arrastre Service, payable within ten (10) days of the succeeding month. The main legal issue involved in this case is whether or not the gross receipts corresponding to the 28% of the total gross income of the Service Contractor delivered to the Bureau of Customs within ten (10) days of the following month should form part of the gross receipts subject to 3% contractor's tax under Section 191 of the Tax Code. The Court of Tax Appeals ruled in favor of the petitioner, holding the view that the said 28% payment by the Arrastre Contractor based on its monthly gross income should not form part of the gross receipts subject to 3% contractors tax and that paragraph 23 of the said Management Contract can legally be construed as a "regulation". As the learned trial court has aptly observed: "x x x the government could not have intended to consider as gross receipts the 28% that went to one of its institutions, the Bureau of Customs, and thereby collect percentage tax on it from petitioner. To hold petitioner liable for the payment of percentage tax is unquestionably unjust and not contemplated by Section 191 of the Tax Code."

All the above-mentioned decisions of the High Court made specific reference to gross receipts which are especially "earmarked by law or legal rule or regulation" as not forming part of the taxable gross receipts for purposes of the gross receipts tax under the Tax Code. For this purpose, it is pertinent to define the word "earmark" as a mark put upon a thing to distinguish it from another. Originally and literally, a mark upon the ear, a mode of marking sheep and other animals. Property is said to be earmarked when it can be identified or distinguished from other property of the same nature. To set apart from others (Black's Law Dictionary, 6th Edition, p. 508). In the case of the Manila Jockey Club, Inc. Executive Order No. 320 and Republic Act No. 309 made the specific "earmarking" for distribution of the total wager fund to different persons other than the proprietor. The same is true in the case of Visayan Cebu Terminal Co., Inc. where the specific earmarking of the 28% of the total monthly gross income to be delivered to the Bureau of Customs by the Contractor was provided in paragraph 23 of the Management Contract. Such specific earmarking of the twenty percent (20%) final income tax as not includible in the gross receipts for purposes of the gross receipts tax was not provided by any law or legal rule or regulations, hence the non-applicability of the above-cited High Court decisions to the Asian Bank Corporation case. This legal observation is also in point in the case of Compania Maritima case where the non-inclusion of the 10% reserve from the total cash collection to avoid claim for refund on freight and passengers tickets not taken is not provided by any law or legal rule or regulations.

In the Asian Bank Corporation case, petitioner bank alleges that subjecting the gross receipts to the 20% final withholding income tax and later to the 5% gross receipts tax is not only oppressive and obnoxious but even a confiscatory form of double taxation. Double taxation has been defined "as the taxing of the same item or piece of property twice to the same person, or taxing it as the property of one person and again as the property of another, <u>but this does not include the imposition of different</u> taxes concurrently on the same property or income (e.g. federal and state income taxes), nor the taxation of the same piece of property to different persons when they hold different interests in it or when it represents different values in their hands, as when both the mortgagor and mortgagee of property are taxed in respect to their interests in it, or when a tax is laid upon the profits of the corporation and also upon the dividends paid to its stockholders" (Black's Law Dictionary, 6th Edition, p. 491). This acceptable form of double taxation is reflected in BIR Ruling No. 223 dated November 2, 1989, thus:

> "The 5% gross receipts tax under Section 120 of the Tax Code is collectible on all finance companies doing business in the Philippines from interests, discounts, and all other items treated as gross income under the Tax Code. Accordingly, your income derived from investing the excess funds in short-term market placements through commercial banks constitutes income hence, subject to the 5% gross receipts tax under said Section. The fact that it has been subjected to the 20% final withholding income tax under Section 50(a) is immaterial. Besides, the withholding tax is imposed under Title II of the Tax Code while the finance tax is provided under Title V thereof." (BIR Ruling No. 223, November 2, 1989)

For as long as the basis for the claim for refund or tax credit certificate is based on the non-inclusion of the amount representing the final withholding income tax under Section 50(a) as part of the gross income subject to gross receipts tax, this dissenting opinion will stand. For purposes of the amusement tax under Section 260 of the Tax Code, the term `gross receipts' embraces `all the receipts' of the proprietor, lessee, or operator of the amusement place. The words `all the receipts' refer to the total amount of cash received which becomes part of the funds of the taxpayer and does not include any money which has been specially earmarked by any law or legal rule or regulation for some other person other than the proprietor, lessee or operator of the amusement place. Receipts means actually received (**Philippine Long Distance Telephone Co. vs. Collector of Internal Revenue, G.R. No. L-3222, January 21, 1952) for itself and not for others, for otherwise they would not be receipts (Manila Jockey Club, Inc. vs. Collector of Internal Revenue, CTA Case No. 205, April 15, 1958; Jai Alai Corporation of the Philippines vs. Araneta, CTA Case No. 108, July 31, 1956 [Annotated, NIRC by Commissioner Jose Arañas, 1988 Edition, p. 687**).

IN VIEW OF THE FOREGOING, I hereby register my dissent to the majority opinion and vote for the denial of the entire claim for refund not because of insufficiency of evidence but for lack of legal bases.

AMANCIO Q. SAGA
Associate Judge